CHENG CHIN CHONG

v.

SHAK HENG & SONS SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOF ABDUL RASHID J
[CIVIL SUIT NO. 242 OF 1973]
27 APRIL 1981

CONTRACT: *Declaration that plaintiff entitled to rescind Sale and Purchase Agreement - Special condition clause not in the agreement - Counterclaim - Caveat - Wrongful entry - Section 329(1) National Land Code.*

The defendants granted an option to a land broker PW 3 to sell their land Lot 6369 for a sum of $79,000/-. Another broker PW2 introduced the plaintiff as a buyer. The plaintiff examined the land and the plaintiff as well as PW2 and PW3 were aware of a large septic tank on the land. The transaction was concluded in a Sale and Purchase Agreement executed by the plaintiff and defendants in the office of M/s. Yeow & Chin who acted for both parties. The agreement was in cyclostyled form and the particulars were typed in including a special condition by which the purchaser agreed to allow the present and future users of the septic tank continued uninterrupted use. The special condition clause appeared after the signatures of the plaintiff and defendants.

The plaintiff applied for a declaration that he was entitled to rescind the agreement on the ground that the special condition clause was not in the agreement when he signed it and as it was a vital clause affecting the value of the land he would not have signed if it had been there.

The defendants counter-claimed damages against the plaintiff for wrongful entry of a Caveat on the title to the land from 5 September 1973 to 30 October 1973 during which time they claimed to have lost a willing purchaser of the land for $79,000/- because of the caveat land and had eventually to sell it for RM40,000 in August 1974.

Held:

[1] The burden is on the plaintiff to prove that the special condition clause was introduced after the execution of the agreement. Taking into consideration that the attesting solicitor was not called to give evidence and the plaintiff's admission to not having examined the agreement thoroughly before signing it the Court found that the special condition clause was inserted before the plaintiff had executed the agreement.

[2] The plaintiff's argument that the option holder was unaware of the encumbrance and that no agreement could be reached between the plaintiff and defendants failed. The option holder was an agent who earned a commission if he introduced a purchaser who eventually buys the land and had no authority to bind the defendants in any other matter.

[3] As the terms of the special condition clause were within the knowledge of their solicitors the defendants themselves must be deemed to have had knowledge of the encumbrance.

[4] The failure of the deal to go through and the delay in ultimately disposing of the said property were not due to the existence of the Caveat. It would have been because of other factors such as the existence of the septic tank.

[Plaintiff's claim and defendants' counter-claim dismissed.]

Cases referred to:
Luxor (Eastbourne) Ltd. v. Cooper [1941] AC 108
Tong Lee Hua v. Yong Kah Chin [1979] 1 MLJ 233

Legislation referred to:
National Land Code 1965, s. 329(1)

For the plaintiff - T.S. Chong; M/s. T.S. Chong & Co.
For the defendants - N. Jagatheson; M/s. John, Ang & Jega

JUDGMENT

Mohd. Yusof Abdul Rashid J:

The plaintiff claims that he had the right to rescind the written agreement executed on 21 May 1973 between he and the defendants in relation to the sale of land comprised in Grant No. 24358 Lot No. 6369 in the Township of Johore Bahru ("the said property") and is claiming for the refund of RM7,900 which he had paid as deposit towards the purchase price of the said property.

The facts of the case were:

The defendants on 17 February 1973 bought the said property for a sum of RM56,000 and gave an option to PW3 and another to procure a purchaser who was willing to buy it for RM79,000. PW2 was contacted by PW3 who informed her that the said property was for sale at that price. PW2 had the plaintiff interested in buying the said property. Evidently PW2 and PW3 knew about the existence of a large septic tank constructed on the land. Before agreeing to buy it, the plaintiff was brought to inspect the said property. The plaintiff was fully aware of the existence of a large septic tank on the said property and the said septic tank was obvious to the eye.

When the plaintiff showed interest in buying the said property at RM79,000, PW2, on the instruction of PW3, brought the plaintiff to the office of Messrs. Yeow & Chin, a firm of solicitors who acted not only as solicitors for the defendants but also, as admitted in the statement of claim, as solicitors for the plaintiff. The sale agreement which was in cyclostyled form was signed by the plaintiff and Mr. Shak Yin Chong who was duly authorised by the defendants to do so, in the presence of and witnessed by Mr. Chin Hon Ngian a partner in the said solicitors firm.

The particulars to be filled in the cyclostyled, sale agreement were typed in and one of the special conditions typed in it was in the following terms:

> The purchaser hereby undertakes to permit the present and future users of the septic tanks within the said land to continue to use the said septic tanks without any interference whatsoever from the purchaser.

It is to be noted that the above terms were typed in after the signatures of the vendor and purchaser. On the margin there was an initial which appears to read as "Chin". According to DW1 the initial was that of Mr. Chin Hon Ngian which contention I have no reason to doubt. It is to be noted also that Clause 7 of the cyclostyled sale agreement was cancelled and on the margin there was an initial which appears to read as "Chin". In this instant, DW1 said that it was the initial of Mr. Chin Hon Ngian also. I have no reason to disagree. Finally, it is to be noted that the above terms bear a heading "Additional Clause" and for the sake of simplicity, the terms will be referred to as "Additional Clause" in this judgment.

The plaintiff contended that the said "Additional Clause" was not there when he signed the sale agreement and asserted that the defendants caused this "Additional Clause" to be introduced into the sale agreement without the plaintiff's consent and after the plaintiff had signed the said agreement. It was contended that the said "Additional Clause" was a vital covenant which would reduce the value of the said property. Had the plaintiff been aware that he was bound by such encumbrance, he would not have agreed to purchase the said property. By unilaterally causing the said "Additional Clause" being introduced, the plaintiff alleged that the defendants had committed a breach of the contract justifying the plaintiff rescinding the sale agreement.

The burden of proving that it was the defendants who had unilaterally caused the introduction of the "Additional Clause" into the sale agreement was indeed on the plaintiff. It would have been a straightforward and uncomplicated issue had the plaintiff been able to require Mr. Chin Hon Ngian to give evidence on his behalf. However, from the Bar, Counsel for the plaintiff intimated that Mr. Chin Hon Ngian was not available and that since Mr. Chin Hon Ngian had indicated to Counsel that he was not able to remember what had actually transpired and since the record kept by his firm relating to this matter had been mislaid, Mr. Chin Hon Ngian would not be able to throw any light on the matter. Hence, Counsel for the plaintiff deemed it appropriate to dispense with the evidence of Mr. Chin Hon Ngian.

In the absence of Mr. Chin Hon Ngian's evidence the plaintiff had to reply on indirect evidence. The plaintiff himself testified that when he signed the sale agreement the "Additional Clause" was not part of the terms of the sale. He realised its presence for the first time when he received a stamped copy of it from Messrs. Yeow & Chin. It was the plaintiff's clerk who explained to the plaintiff the significance of the "Additional Clause". Immediately, the plaintiff wrote to Messrs. Yeow & Chin but he received no reply. On being cross-examined by the Counsel for the defendants, the plaintiff stated that he did not examine the sale agreement page by page before he signed it; he was not even aware of the cancellation of Clause 7 of the sale agreement. The plaintiff admitted that before he agreed to buy the said property, he went and inspected the land. He noticed the septic tank which was a large one, but half the size of the Court room. It was also disclosed in Court that had the plaintiff examined the extract document of title to the said property, he would have known about the existence of the septic tank on the said property. The plaintiff made no further inquires regarding the septic tank.

One, Lee Sau, who was granted an option with another by the defendants, was called as a witness for the plaintiff. The option reads:

Option

Whereas by an option dated 5 March 1973, in respect of land held under Johore Government Grant No. 15857 Lot No. 6369 holder of the said option I hereby grant this option to Mr. Lee Sau (I/C 0001330) of No. 3 Jalan Tampoi, Tampoi, Johore Bahru and Mr. Kim Chai (I/C 2306939) of 13, 13th floor, Block C, Jalan Lumba Kuda, Johore Bahru on the following terms and conditions:

(i) The price of the land to be sold as agreed upon is at the rate of RM79,000 (Ringgit Seventy Nine Thousand Only).

(ii) If the land is sold at more than RM79,000 (Ringgit Seventy Nine Thousand Only), no commission (2%) shall be paid to the option holder but any amount in excess thereof shall outright belong to the option holder.

(iii) This option shall expire on 22 April 1973.

To my mind the option was an agreement to appoint Mr. Lee Sau and Mr. Kim Chai as commission agents who were to procure a buyer for the said property. It was agreed by the grantor that if the said property were sold at RM79,000 then the said commission agents would be entitled to a 2% commission. However, should the said property be sold for more than that price, the commission agents were entitled to keep whatever sum in excess of RM79,000 as their commission in lieu of the said 2% commission.

It was the contention of the plaintiff that the defendants had deliberately suppressed a material fact by not informing the option holders about the encumbrance, attached to the septic tank; that since the option holders were not aware of such encumbrance it was more probable that no agreement was reached between the plaintiff and the defendants on this matter. In the circumstances, I have to examine the position of the option holders to ascertain what were their authorities in this transaction.

Viscount Simon LC in the House of Lords case of *Luxor (Eastbourne) Ltd. v. Cooper* [1941] AC 108, 120 said:

> It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount ...
>
> There is another class of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and, it may be, expends money and time in endeavouring to carry it out ...
>
> But there is a third class of case ... where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal ...

In his evidence, Mr. Lee Sau testified that his responsibility was to introduce to the defendants a prospective purchaser who was willing to pay RM79,000 for the said property. Mr. Lee Sau had no authority to bind the defendants on any other matter relating to the said property. This was consistent with his conduct when, on being informed that the plaintiff was interested to purchase the land, he directed PW2 to take the plaintiff to the office of Messrs. Yeow & Chin. It seems to me that PW2 was the plaintiff's broker. The details regarding the terms and conditions of the proposed sale agreement were left to the plaintiff to negotiate either with the authorised representative of the defendant company or with the said solicitors. As soon as the plaintiff was introduced to the defendants, both Mr. Lee Sau and PW3 dropped out of the picture. In my view, Mr. Lee Sau falls within the first class of the commission agent as set out by Viscount Simon LC in the above case. In the words of Chang Min Tat FJ in the Federal Court case of *Tong Lee Hua v. Yong Kah Chin* [1979] 1 MLJ 233, Mr. Lee Sau was given an option by the defendants and:

> ... the sale was effected in truth and in fact through his introducing the purchaser to the vendors or to borrow a term from the Stock Exchange ... contract was the result of the 'marriage' of the vendors' offer to sell and the purchaser's offer to buy though the intermediation of the broker arising from his knowledge or information gained by him that the vendors were prepared to sell at a certain price and the purchaser was agreeable to buy at that price ...

As such, the knowledge of the encumbrance attached to the septic tank possessed by the defendants could not possibly be imputed to Mr. Lee Sau though it might well be inferred that Mr. Lee Sau knew about the existence of the septic tank on the said property without knowing the encumbrance attached to it. I could not accept the allegation that Mr. Lee Sau knew about the encumbrance and that he had deliberately suppressed the material fact regarding the said property. Nor could I accept similar allegation against the defendants.

The statement of claim and the plaintiff disclosed that Messrs. Yeow & Chin was acting for him and for the defendants. I am satisfied that the defendants were fully aware of the encumbrance attached to the septic tank and so was Messrs. Yeow & Chin. It is thus reasonable to find that though the plaintiff was ignorant of such encumbrance, his solicitors were knowledgeable about it and I accept the fact that the solicitors had failed to enlighten the plaintiff regarding the said encumbrance, thus the fault lies with the said solicitors. As the terms in the "Additional Clause" were within the knowledge of the solicitors for the plaintiff, the question of the said "Additional Clause" being suppressed by the defendants does not arise.

The plaintiff in para. 6 of the statement of claim asserted that:

> (1) The defendant caused an additional clause to be introduced into the said agreement and inserted at the bottom of p. 4 of the said agreement without consulting the plaintiff and without the plaintiff's agreement; the additional clause reads: ...

Weighing the evidence in its totality, I am satisfied that on the balance of probability, the plaintiff had failed to prove that the said "Additional Clause" was inserted after the plaintiff had signed the said agreement and that it was the defendants who had unilaterally caused the said "Additional Clause" to be introduced. In fact, I am satisfied on the balance of probability that the "Additional Clause" was typed on the sale agreement before the plaintiff signed it and that when the plaintiff signed the sale agreement he had not appreciated the significance of the "Additional Clause".

I am fortified in my view when I compared the sale agreement dated 17 February 1973, that is to say the sale agreement executed between Wong Sze Ming and Sim Lai Hoe and the defendants, tendered as Exhibit D8, with the sale agreement the subject-matter of the instant proceedings, tendered as Exhibit P1. I found that similar "Additional Clause" was inserted in D8 immediately after the signatures of the purchasers and the vendors. It is not unreasonable then to infer that when preparing P1, the solicitors had produced a copy, duplicating D8 in its entirety. It is observed that Clause 7 in D8 as also Clause 7 in P1 was deleted.

Again, the plaintiff alleged that he did not see the "Additional Clause" when he signed the sale agreement but he agreed that he did not examine the sale agreement page by page nor was he aware that cl. 7 was deleted. In the circumstances I cannot accept that the plaintiff was observant enough to notice the presence or absence of the "Additional Clause" in the sale agreement when he signed it. It is more probable that the "Additional Clause" was typed on the sale agreement before the plaintiff signed it.

On the above grounds the application for a declaration that the plaintiff had the right to rescind the sale agreement is refused and the action is dismissed with costs.

The defendants counterclaim against the plaintiff for damages for the wrongful entry of a caveat on the document of title to the said property. The defendants could do so under s. 329(1) of the National Land Code which provides:

329(1) Any person or body who wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

To succeed in claiming, compensation against the plaintiff under s. 329(1) of the Code, the defendants have to prove that the plaintiff had secured the entry of the caveat wrongfully or without reasonable cause and that due to such wrongful entry the defendants had suffered damages or loss.

It was disclosed that the plaintiff caused a caveat to be entered on the document of title to the said property on 5 September 1973 but it was removed on 30 October 1973 by an order of the Court at the instance of the defendants. The plaintiff averred that the caveat was entered to protect his interest on the RM7,900 he paid as deposit to the defendants. In evidence the defendants alleged that soon after the plaintiff had purported to rescind the sale agreement, a prospective purchaser was found, willing to purchase the said property for RM79,000. On the purchaser discovering that there was a caveat entered against the said property, he refused to go through with the transaction. When the caveat was finally removed, the defendants approached the prospective purchaser but by then the said purchaser had no more interest to proceed with the deal. The said property was only disposed of on 10 August 1974 for RM40,000.

I find it unnecessary to determine whether or not the caveat was entered wrongfully or without reasonable cause because I am not satisfied that any loss incurred by the defendants was occasioned by the entry of the said caveat. The allegation made by the defendants that a buyer was willing to purchase the said property for RM79,000 could not be accepted by me. If indeed the purported purchaser was keen to purchase the property the lapse of time from 5 September 1973 to 30 October 1973 should not make any difference. As such, if it was true that there was a prospective purchaser then the failure of the deal to go through might be attributed to some other causes than due to the entry of the caveat. Similarly, the delay in ultimately disposing of the said property was not due to the entry of the caveat. If at all, it is obvious that no one was interested in the said property due to the encumbrance attached to the septic tank.

Accordingly I dismiss the counterclaim.

Also found at [1981] CLJ 91